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JOHN F. DAVIS, CLERK

IN THE  
Supreme Court of the United States

OCTOBER TERM, 1968

No. 68-20

FEDERAL TRADE COMMISSION, *Petitioner*

v.

FLORILL PRODUCTS, INC., and MRS. MEYER L. LEWIS,  
ALBERT S. HEISER, and ARTHUR H. HEISER,  
as Officers of said Corporation

MEMORANDUM FOR RESPONDENTS IN OPPOSITION

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1966

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No. 668

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FEDERAL TRADE COMMISSION, *Petitioner*

v.

FLOTILL PRODUCTS, INC., and MRS. MEYER L. LEWIS,  
ALBERT S. HEISER, and ARTHUR H. HEISER,  
as Officers of said Corporation

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**MEMORANDUM FOR RESPONDENTS IN OPPOSITION**

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The question presented is whether two members of the five-member Federal Trade Commission can issue an enforceable adjudicatory order of the Commission. The Court of Appeals below held that such an order required the support of a majority, or three members, of the Commission.

The petition puts forth no arguments that make this issue worthy of review by this Court. The issue was fully briefed, argued, and carefully considered in an extended opinion by the Court of Appeals below. As the court said:

We have examined the authority and arguments put forth by both parties and find ourselves in

agreement with petitioners that, absent statutory authority or instruction to the contrary, three members of a five member commission must concur in order to enter a binding order on behalf of the commission. (Pet. 13-14)

Moreover, the court below granted a request by the Commission for rehearing, and after further briefing and oral argument, the court, sitting *en banc*, affirmed its decision. (Pet. 31)

Contrary to the Commission's contention, there is no significant conflict in decisions. It is true that the Court of Appeals for the Sixth Circuit in *Atlantic Refining Company v. F.T.C.*, 344 F.2d 599 (6th Cir. 1965), *cert. denied*, 382 U.S. 939 (1965) reached a contrary conclusion, but as the court below pointed out, "the court in *Atlantic Refining* both misconstrued the FTC rule and relied upon a case, *Drath, supra*, which is not shown to be in point." (Pet. 14, fn. omitted) In *Drath v. F.T.C.*, 239 F.2d 452 (6th Cir. 1956), the issue in the instant case was not raised inasmuch as three members of the Commission agreed to the order issued. In other words, as the court below observed, the two-sentence statement in *Atlantic Refining* contained only "a bare conclusion" and made "no attempt to support its position in reason." (Pet. 15)

The petition also fails to demonstrate the existence of any issue of importance. The contention that the holding below will "unnecessarily delay the disposition of a substantial number of cases" is a matter of pure conjecture. (Pet. 6-7) There is no showing that the rule will really interfere with the work of the Commission. It has not done so in the case of other regulatory agencies.

It is argued in the petition that the ruling below requiring concurrence by three members of the Commis-

sion creates "an anomalous situation" because "[w]here only three members are participating, the Commission can not know whether it has the authority to decide a case until after it has heard argument and voted." (Pet. 7) But this situation is no more anomalous than when four members of the Commission are sitting, for the Commission can not know in advance whether two of the Commissioners will decide against taking affirmative action. In either event, concurrence of three members of the Commission is required.

Lastly, the Commission has not been prejudiced as a result of the disposition of the case below. Despite the procedural deficiency in the Commission's action on Section 2(c) of the Robinson-Patman Act, the court did not dismiss the case but instead remanded it "to the Commission for further hearings to determine whether a majority of the Commission desire to enter such an order." (Pet. 18)

For these reasons, as well as those detailed in the opinions below, it is submitted that the decision in this case is correct and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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